

## ***Solid Waste Industry Concerns for discussion at the CIWMB Workshop on Draft Regulations for Cost-Estimates for PCC, CA and FA Demonstrations.***

1. **Section 43050 Study.** AB 2296 directed the CIWMB to conduct a comprehensive study to define the conditions that potentially affect solid waste landfills, including technologies and engineering controls designed to mitigate potential risks, in order to identify potential long-term threats to public health and safety and the environment. The board shall also study various financial assurance mechanisms that would protect the state from long-term post-closure and corrective action costs in the event that a landfill owner or operator fails to meet its legal obligations to fund post-closure maintenance or corrective action during the post-closure period. The board, on or before July 1, 2009, shall adopt regulations and develop recommendations for needed legislation to implement the findings of the study. The CIWMB has just authorized the expenditure of \$300,000 to conduct this study. Broad issues beyond the need to adjust cost estimating procedures for closure and post-closure care should be addressed as part of this study, not in regulations to be considered by the CIWMB prior to completion of this study (see issue #2 below). This study is herein referred to as the **Section 43050 Study**.
2. **Section 43501(a)(1)(A)(ii) Regulations.** AB 2296 also directs the CIWMB to adopt regulations on or before January 1, 2008, that require closure and post-closure maintenance cost estimates to be based on reasonably foreseeable costs the state may incur if the state would have to assume responsibility for the closure and post-closure maintenance due to the failure of the owner or operator. Cost estimates shall include, but not be limited to, estimates in compliance with Sections 1770, 1773, and 1773.1 of the Labor Code, and the replacement and repair costs for longer lived items, including, but not limited to, repair of the environmental control systems. These regulations are herein referred to as the **Section 43501(a)(1)(A)(ii) Regulations**.
3. **Limited statutory scope for 43501(a)(1)(A)(ii) Regulations.** The 43501(a)(1)(A)(ii) Regulations are strictly limited to closure and post-closure cost estimates based on “reasonably foreseeable costs” that the state may incur. It has nothing to do with corrective action and financial assurance mechanisms. Any provisions of the proposed regulations that are not associated with the narrow provisions of this later provision of AB 2296 should be removed and deferred for consideration as part of the pending study to be completed in one year.
4. **Cost estimates based on current costs with no adjustments based on inflation factors.** Similar language appears in several locations (page 1, lines 9-13; page 2, lines 31-32; page 7, lines 51-52). The purpose of this language is apparently to require full updating of the closure, post-closure care and corrective action plans each time such a plan is amended, updated or revised. However, by requiring use of only “current unit costs” it also appears that this language would prevent the consideration of “discounting” when preparing future closure and post-closure cost estimates. Discounting would allow future anticipated costs to be discounted to present costs based on the time-value of money. This issue should be deferred for future discussion as part of the Section 43050 Study. The solid waste industry requests that the regulations be revised to allow the discounting of projected future costs.

Further, the proposed prohibition on “only” inflation factor adjustments would appear to be in conflict with other provisions of the proposed regulations that specifically encourage use of inflation factors (e.g., page 9, line 40). In addition, if the only change from the last plan to the current plan is “inflation” why shouldn’t the cost estimate be revised to adjust for “inflation only”?

5. **Proposed Section 21787 is outside the scope of the 43501(a)(1)(A)(ii) Regulations and should be deleted.** This proposed section deals with Corrective Action Plans (CAPs). CAPs are outside the scope of the statutory authorization for the Section 43501(a)(1)(A)(ii) Regulations which are limited to only closure and post-closure cost estimates. This issue should be deferred 43050 Study. Corrective Action Issues are specifically included in the scope of that study.
6. **“Reasonably Foreseeable threats” and “reasonably foreseeable releases”.** The basis for this language (page 2, lines 25 and 26) is derived from regulations previously adopted by the State Water Resources Control Board in 1992 to encourage the installation of more extensive groundwater monitoring systems. Existing SWRCB regulations require an estimate of the most extensive release that could occur prior to detection by the groundwater monitoring system. The reasoning behind this regulation is that a tighter groundwater monitoring system would likely result in a smaller release prior to detection. The clear objective of the current SWRCB requirement is to encourage facility operators to install “tighter” and more extensive groundwater systems. The basis of having this requirement in CIWMB regulations is not clear and has not been justified or clearly explained. Further evaluation of extending this language to beyond its current application to potential released to groundwater and the need for more extensive groundwater monitoring systems should be evaluated as part of the Section 43050 study – not these Section 43501(a)(1)(A)(ii) Regulations. Unless clearly justified as part of the forthcoming Section 43050 Study, the regulations of the CIWMB should be similarly restricted to the groundwater release purpose as it is currently implemented by the SWRCB.

See Chapter 15 Technical Note #8 at:

<http://www.waterboards.ca.gov/cwphome/land/docs/ch15tn8.pdf>.

7. **Detailed Schedule and Approval of Disbursements.** This proposed language on page 3, lines 43 – 49 is not clear or appropriate. There appear to be at least 3 problems with this language:
  - In the first place, the meaning of the word “schedule” is not clear. Does this word refer to a time frame related “schedule of events” or does it refer to one of the other frequently used meanings:
    1. A list of times of departures and arrivals; a timetable: *a bus schedule; a schedule of guided tours.*
    2. A plan for performing work or achieving an objective, specifying the order and allotted time for each part: *finished the project on schedule.*
    3. A printed or written list of items in tabular form: *a schedule of postal rates.*
    4. A program of events or appointments expected in a given time: *Can you fit me into your schedule Tuesday afternoon?*
    5. A supplemental statement of details appended to a document.
  - Further, this language does not appear to have any direct bearing on the “closure and post-closure maintenance cost estimates to be based on reasonably foreseeable costs the state may incur if the state would have to assume responsibility for the closure

and post-closure maintenance due to the failure of the owner or operator” – which, by statute, is the basis for these required regulation. Issues not directly pertaining to cost estimating should be deferred for evaluation as part of the Section 43050 Study.

- In addition, this language would appear to require a “detailed” schedule of disbursements when the final closure plan is prepared. This language would appear to make any deviation from this pre-approved schedule a basis for denying disbursements. Thus, the operator would be forced to amend the detailed schedule whenever the schedule changes in order to receive disbursements. This would be an extremely cumbersome process given that it can be expected that a detailed schedule is likely subject to continuous change and revision during the closure process. A wide variety of unknown variables could change the schedule due to weather conditions alone. This provision should be deleted.
8. **General Cost Estimating Criteria.** Proposed Section 21815, subdivisions (a), (b), (c) and (d) -- The provisions related to the labor code may be appropriate as that is consistent with AB 2296 language related to the Section 43501(a)(1)(A)(ii) Regulations and may be appropriate for inclusion. However, the basis for the inclusion of the other Caltrans provisions is not known, the CIWMB must provide this information to all interested parties for review and comment [(b)(2) and (3)]. This has not been done.
  9. **20 % Cost Estimate Factor in Proposed Section 21815.** Under previous regulations this provision was limited to Closure Costs estimates only. Closure costs are construction expenditure intensive and this appropriate. However, the proposed regulations would extend this provision to post-closure care (and potentially to corrective action) – both of which have extensive non-capital related costs. The extension of the 20% factor to all post-closure and corrective action activities is a totally new concept and is something that is not expressly authorized for inclusion in the Section 43501(a)(1)(A)(ii) Regulations. This concept needs further discussion and evaluation as part of the 43050 Study.
  10. **Penalty of Perjury in failure to predict future events in Proposed Section 21815.** We believe that this concept is contrary to accepted jurisprudence and must be deleted. Perjury can only occur for failure to truthfully relate known events. This new provision in proposed subdivision (f) would try to impose a penalty of perjury for failure to predict future events – a totally unreasonable and impossible requirement!!
  11. **Eliminate of 20% cost factor from Section 21820.** This section should remain unchanged as the 20% cost factor should remain restricted to closure costs until completion of the 43050 Study. See comment 9 above.
  12. **Extension of Post-closure Period from 30 to 50 years in Section 21840.** This new requirement is totally beyond the scope of the Section 43501(a)(1)(A)(ii) Regulations as authorized by the legislature. These regulatory changes are to be related to cost estimating procedures – not other potential changes to be evaluated as part of the Section 43050 Study. There is no basis for extending the PCC period to 50 years. An alternative to this approach that should be evaluated as part of the 43050 study is to simply return to the existing Subtitle D requirements that establish an initial 30-year period that may be lengthened or shortened as determined by the authorized state based on the need to protect human health or the environment.
  13. **Reference to “until the waste no longer pose a threat to human health or the environment (sic)” in Section 21840, Section 22210 and Section 22235.** This provision appears to be in contradiction to either a 30 or 50-year post-closure period. Further, such a requirement would appear to not be strictly related to cost-estimating procedures and, as

such, evaluation of this type of language should be reserved for the Section 43050 Study – not these regulations. This language could be interpreted to authorize a “rolling post-closure care period” rather than the current “adjustable fixed PCC period” that we believe is authorized under existing statute and regulations. This language should be deleted from the proposed Section 43501(a)(1)(A)(ii) Regulations (in Sections 21840, 22210, and 22235).

14. **Dual options for subdivision (a)(3) of Section 21840.** These dual options should be dropped and evaluated along with other potential alternatives as part of the Section 43050 Study. Reference to activities that may occur less often than every 50 years as occurring every 50 years does not make sense. Potentially this could mean that repairs associated with a 1000 (or 10,000) year flood or a 1000 (or 10,000) year earthquake would have to be calculated as occurring every 50 years. This is patently absurd and should be rejected.
15. **Changes in Financial Assurance for Post Closure Care.** These proposed changes starting on page 8 through page 20 should be deleted as they are beyond the scope of the Section 43501(a)(1)(A)(ii) Regulations. Again, these regulations should be limited to only cost estimating issues as authorized by AB 2296. Other issues, such as reflected by the proposed changes to the financial assurance regulations should be reserved for the Section 43050 Study.
16. **Reference to “Perpetual Care” and (SMIF) in Section 22210.** New paragraph (2) of Subdivision (a) should be stricken. Again, this is a new concept that needs further objective evaluation during the Section 43050 Study. Language related to perpetual maintenance is not appropriate for the Section 43501(a)(1)(A)(ii) Regulations. In addition, a definition of Surplus Money Investment Fund (SMIF) is not included in the proposed language. Section 22210 should remain unchanged until completion of the Section 43050 Study.
17. **Construction Cost Price Index (to be determined).** This language on line 40 of page 9 is undefined in Section 22236 and should be deleted.
18. **Adjustment to Tangible Net Worth in the Financial Means Test.** This issue (pages 11 and 12) should be reserved for the Section 43050 Study and not addressed in the Section 43501(a)(1)(A)(ii) Regulations.
19. **Timely payments by Insurers.** This issue on line 46 page 14 to line 2 on page 15 should be reserved for the Section 43050 Study and not addressed in the Section 43501(a)(1)(A)(ii) Regulations.